

JERRY MORAN

FIRST DISTRICT
KANSAS

COMMITTEE ON
AGRICULTURE

RANKING MEMBER
SUBCOMMITTEE ON GENERAL FARM
COMMODITIES AND RISK MANAGEMENT

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE

COMMITTEE ON
VETERANS' AFFAIRS

SIGN UP FOR EMAIL UPDATES:
WWW.JERRYMORAN.HOUSE.GOV

Congress of the United States
House of Representatives
Washington, DC

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2202 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-1601
(202) 225-2715
FAX (202) 225-5124

DISTRICT OFFICES:
1200 MAIN STREET
SUITE 402
P.O. BOX 249
HAYS, KS 67601-0249
(785) 628-6401
FAX (785) 628-3791

ONE NORTH MAIN
SUITE 525
P.O. BOX 1128
HUTCHINSON, KS 67504-1128
(620) 665-6138
FAX (620) 665-6360

119 WEST IRON
SUITE 403
P.O. BOX 766
SALINA, KS 67402-0766
(785) 309-0572
FAX (785) 827-6957

The Honorable Thomas J. Vilsack
Secretary
United States Department of Agriculture
1400 Independence Ave., SW
Washington, D.C. 20250

Dear Secretary Vilsack:

On June 22, 2010, the U.S. Department of Agriculture (USDA), Grain Inspection Packers and Stockyards Administration (GIPSA) published a proposed rule, "Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act" (Proposed Rule). Since publication of the Proposed Rule, I have heard numerous concerns and comments about both the process used to propose this rule and the substance contained in the rule.

While I have received a wide variety of complaints from producers, I am most concerned about the Department's failure to conduct an economic analysis of the Proposed Rule. I believe the lack of substantive economic analysis misleads livestock producers about the potential impact of this proposal and is contrary to the purpose of the Administrative Procedure Act and the requirements of Executive Order 12866.

The Administrative Procedure Act generally requires public notice of proposed rule making. Executive Order 12866 expands on that directive and requires that each agency prepare a "Regulatory Plan" and for each "significant regulatory action" the Regulatory Plan contain "preliminary estimates of the anticipated costs and benefits of each rule."¹ Significant regulatory action includes "any regulatory action that is likely to result in a regulation that may . . . [h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities"² By GIPSA's own admission, the Proposed Rule is significant.³ Therefore, an economic analysis that details preliminary costs and benefits is required.

Although GIPSA claims to "have prepared an economic analysis for this proposed rule," simply stating an economic analysis has been completed does not make it so.⁴ At least ten times throughout the Proposed Rule, GIPSA restates some version of the phrase, "GIPSA believes that

¹ Exec. Order No. 12866, 50 Fed. Reg. 51735 (Oct. 4, 1993), as amended by Exec. Order 13258, 67 Fed. Reg. 9385 (Feb. 26, 2002) and Exec. Order 13422, 72 Fed. Reg. 2763 (Jan. 23, 2007).

² *Id.*

³ Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35338, 35345 (proposed June 22, 2010).

⁴ *Id.*

potential benefits are expected to exceed costs.”⁵ Despite these conclusory statements, GIPSA provides neither quantitative nor qualitative data to support this conclusion. The only section of the Proposed Rule that displays anything resembling quantitative data is analysis of how much it might cost affected parties and GIPSA to keep additional records.

Compounding the concern that GIPSA omitted a substantive economic analysis in its Proposed Rule are the conclusions drawn in GIPSA’s most recent study of alternative marketing agreements (AMAs). In February 2007, GIPSA released “GIPSA Livestock and Meat Marketing Study Final Reports” (hereinafter referred to as the “RTI Study”). The RTI Study concluded that: “In aggregate, restrictions on the use of AMAs for sale of livestock to meat packers would have negative economic effects on livestock producers, meat packers, and consumers.”⁶ The RTI study also found that over a ten-year period, a 25 percent reduction in the use of AMAs in the beef sector would cumulatively reduce profits of beef producers by \$12.2 billion and reduce consumer surpluses by \$2.5 billion.⁷ Reduced profits in beef industry included a reduction of \$5.1 billion for cattle feeders, \$3.9 billion for fed cattle producers, \$1.7 billion for wholesale beef producers, and \$1.5 billion retail beef producers.⁸

Due to the absence of an economic analysis, it is unclear the extent to which the Proposed Rule would impact AMAs. The Proposed Rule itself, however, establishes that restriction of AMAs is certain. The proposed rule states: “The regulations in this part, when referencing contracts or agreements generally, apply to all swine production contracts, poultry growing arrangements and livestock production and marketing contracts, including but not limited to, formula and forward contracts.” This is closely aligned with the definition of an AMA in the RTI Study that defines AMAs to include “arrangements such as forward contracts, marketing agreements, procurement or marketing contracts, production contracts, packer ownership, custom feeding, and custom slaughter.”⁹

After establishing that the terms of the Proposed Rule apply to AMAs, the Proposed Rule then makes numerous changes to existing law that will lead to restriction of AMAs. For example, the Proposed Rule attempts to remove the longstanding requirement, previously upheld by eight different U.S. Circuit Courts of Appeal,¹⁰ that a demonstration of competitive injury is necessary to prove a violation of Sections 202(a) and (b) of the Packers and Stockyards Act of 1921.¹¹ Section 201.3(c) of the Proposed Rule states: “A finding that the challenged act or practice adversely affects or is likely to adversely affect competition is not necessary in all cases.”¹² Not only did GIPSA not conduct an economic analysis of this provision in the regulation, but it even failed to make a conclusory statement about whether the cost of such a change would outweigh the benefits.

Furthermore, in Section 201.210(a)(5) of the Proposed Rule, GIPSA states that failing to document the “reasons and substantiating the revenue and cost justification associated with [a]

⁵ *Id.* at 35345-35348.

⁶ RTI International, *GIPSA Livestock and Meat Marketing Study Final Reports*, Volume 1: Executive Summary and Overview (January 2007), at ES-3.

⁷ RTI International, *GIPSA Livestock and Meat Marketing Study Final Reports*, Volume 3: Fed Cattle and Beef Industries (January 2007), at 6-53.

⁸ *Id.*

⁹ RTI International, *GIPSA Livestock and Meat Marketing Study Final Reports*, Volume 1: Executive Summary and Overview (January 2007), at ES-1.

¹⁰ See *Terry v. Tyson Farms, Inc.*, No. 08-5577, slip op. at 7 (6th Cir. 2010) (citing opinions from U.S. Circuit Courts of Appeals that support the requirement that a plaintiff must demonstrate competitive injury to prevail on an action under Section 202(a) and (b) of the Packers and Stockyards Act of 1921).

¹¹ 7 U.S.C. § 192(a)-(b).

¹² Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. at 35351.

premium or discount” could be classified as an “unfair, unjustly discriminatory and deceptive practice or device” constituting a violation of Section 202(a) of the Act.¹³ Despite the absence of any preexisting regulatory requirement, GIPSA simply dismisses this new requirement as a clarification of existing requirements.¹⁴ In addition, GIPSA acknowledges potential costs associated with the change in Section 201.210(a)(5), but dismisses the costs as “not widespread” without providing any justification for its conclusion.¹⁵

The absence of an economic analysis is even more concerning because USDA has the tools and personnel to undertake an in-depth economic analysis of the changes suggested in the Proposed Rule. For the 2010 Fiscal Year, Congress appropriated over \$13 million to the USDA Office of the Chief Economist.¹⁶ Earlier this year, USDA did not hesitate to task the Chief Economist with an analysis of pending climate change legislation. For the Proposed Rule, however, analysis by the Chief Economist is absent.

Whether livestock producers agree or disagree with the Proposed Rule, it is essential that USDA accurately represent the economic impact of the Proposed Rule. In its current form, the Proposed Rule contains no accurate quantitative or qualitative economic analysis.

An additional concern about the Proposed Rule that has recently been brought to my attention includes the USDA/Department of Justice (DOJ) public workshop on competition in agriculture, recently convened in Fort Collins, Colorado, on August 27, 2010. The USDA/DOJ workshop was part of a series of meetings noticed in the Federal Register as “Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy.”¹⁷ You attended this workshop and I am informed that you stated, during the workshop, that comments made at the workshop would be included in the comments on the Proposed Rule.¹⁸

I view this announcement by you, after the workshop had already been convened, to be a serious violation of the Administrative Procedure Act (APA). The APA states: “General notice of proposed rule making shall be published in the Federal Register. . . . The notice shall include . . . a statement of the time, place, and nature of public rule making proceedings”¹⁹

USDA failed to notice the Fort Collins workshop as a public rule making proceeding in both its notice of the Proposed Rule of June 22, 2010, and its notice of the competition workshop on August 27, 2009. While the general competition workshop series was noticed in the Federal Register on August 27, 2009, none of the specific locations, dates, or times of the workshops were noticed in the Federal Register. The Federal Register notice on August 27, 2009, did not state that the Ft. Collins location was an official rule making proceeding under the Proposed Rule and it did not state that comments on the Proposed Rule could be submitted at the Ft. Collins workshop. Such failure to properly notice the Ft. Collins workshop as a rule making proceeding under the Proposed Rule may have deprived agricultural producers of a chance to participate in the proposed rule making and misled the agricultural industry as to the true purpose of the competition workshop.

¹³ *Id.*

¹⁴ *Id.* at 35345-35346.

¹⁵ *Id.*

¹⁶ Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-80, 123 Stat. 2090 (2009).

¹⁷ Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy, 74 Fed. Reg. 43725 (August 27, 2009).

¹⁸ Sally Schuff, *Livestock Competition Comments to be Considered in Proposed GIPSA Rule*, FEEDSTUFFS, August 27, 2010, at <http://www.feedstuffs.com/ME2/Segments/NewsHeadlines/Print.asp?Module=News&id=9FEFA0D5D25B425C9DD2BBCFBFA9901E>.

¹⁹ 5 U.S.C. § 553(b).

Due to the above mentioned inadequacies of the Proposed Rule, I ask USDA to withdraw the Proposed Rule. I also ask that USDA not resubmit a new proposed rule until an economic analysis is completed and made public by the USDA Chief Economist and proper notice is given by USDA as to the time, place, and nature of all public rule making proceedings.

Sincerely,

Jerry Moran

Jerry Moran

JM:aa